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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **BENCH MEMORANDUM RE: ADMISSIBILITY OF EVIDENCE RELATING TO LESSER INCLUDED OFFENSE** **(The Honorable Warren Darrow)**

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The State of Arizona, through undersigned counsel, hereby submits this Bench Memorandum regarding the admissibility of evidence relating to the lesser included offense of negligent homicide during the State's case-in-chief. This request is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

A. The State should not be barred from presenting evidence of negligent homicide, an offense that is charged as a lesser-included under Rule 13.2(c), Ariz. R. Crim. P. .

In addressing the admissibility of the prior sweat lodge ceremonies and the signs and symptoms demonstrated by the participants, this Court has found certain evidence to be relevant to the lesser-included charge of negligent homicide to show Defendant failed to perceive a substantial and unjustifiable risk. However, this Court has ruled that the evidence is not relevant to show Defendant knew that a substantial and unjustifiable risk existed and consciously disregarded that risk, which is the requisite mental state for the charge of manslaughter.

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Specifically, this Court has ruled that evidence that is only relevant to the lesser-included offense of negligent homicide may not be admitted in the State's case-in-chief.

The State has found no law to support this Court's ruling. The State did identify one case, *Merlina v. Jejna,* 208 Ariz. 1, 90 P.3d 202 (App. 2004), in which a defendant argued that the State could not formally charge both the greater offense and the lesser-included offense because to do so violated both double jeopardy and Rule 13.2, Ariz. R. Crim. P. The Court of Appeals rejected Defendant argument and noted that Rule 13.2 is "permissive, not prohibitive. It allows the State to charge only the greater offense and relieves the State of any obligation to expressly charge the lesser." *Id.* at 3. "Moreover, lesser-included and greater offenses must both be submitted to the jury under Rule 13.2." *Id.* "This provision is intended as a solution to the ambiguities caused by "open" charges--*i.e.,* charges which do not specify the degree of a crime charged--***by requiring the prosecutor to specify only the most serious degree, and automatically including all necessarily included offenses within the charge.*** This also clarifies the prosecutor's right to request instructions as to necessarily included offenses." *Comment to Rule 13.2, Ariz. R. Crim. P.,* (emphasis added).

> The rule neither expressly not impliedly forbids charging a lesser-included offense. Its apparent purpose, to provide notice to a defendant that all lesser included offenses are also charged when only the greater offense is charged is not furthered by Defendant's interpretation.

Merlina, supra at 4.

Under the current ruling, this Court is preventing the State from presenting relevant evidence relating to a charged offense (negligent homicide). It is properly left to the jury to decide whether the evidence presented by the State supports the lesser charge only or the greater charge. *State v. Schwartz,* 14 ArizApp. 531, 534, 484 P.2d 1060 (App. 1971); *State v. Scott,* 118 Ariz. 383, 386, 576 P.2d 1383, 1386 (App. 1978) ("Although appellant could not be punished for

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both violations, "the State was not required to make an election as to which charge to prosecute.")

It is undisputed under the plain language of Rule 13.2(c) and Arizona case law that when the State charged Defendant with manslaughter it also charged him with the lesser-included offense of negligent homicide. This Court is essentially precluding the State from presenting relevant evidence to a charged offense and should reconsider its previous ruling.

B. Evidence of negligent homicide is relevant to the charge of manslaughter.

Manslaughter is established where a person, aware of a ***substantial and unjustifiable risk*** that his or her conduct will cause the death of another, consciously disregards that risk. Negligent homicide is established where a person fails to perceive the ***substantial and unjustifiable risk*** that his or her conduct will cause the death of another. The element of the greater not found in the lesser is awareness of the risk. *Fisher, supra* at 247-248, 686 P.2d at 770-771. *See also State v. Walton,* 133 Ariz. 282 291, 650 P.2d 1264, 1273 (App. 1982) (emphasis added).

In order to prove either negligent homicide or manslaughter, the State must first prove that a substantial and unjustifiable risk of death was created by Defendant's version of a sweat-lodge ceremony. The State must also prove that Defendant's disregard of the risk was a gross deviation from the standard of conduct that a reasonable person would observe in that situation. Finally, the State must establish one of two mental states. To prove manslaughter the State must establish that Defendant was aware of the risk and consciously disregarded it. To prove negligence that State must establish that Defendant failed to perceive the risk existed. Both of these mental states can be established by circumstantial evidence. See *In re William G.* 192 Ariz. 208, 213, 963 P.2d 287, 292 (App. 1997) ("We recognize that absent a person's outright

admission regarding his state of mind, his mental state must necessarily be ascertained by inference from all relevant surrounding circumstances."); *cf. State v. Routhier,* 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983) ("Criminal intent, being a state of mind, is shown by circumstantial evidence. Defendant's conduct and comments are evidence of his state of mind.").

As noted previously by the State, the mental states for negligent homicide and manslaughter lie along a continuum of *mens rea.* Arizona Revised Statute § 13-202(C) states that "[i]f a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts intentionally, knowingly or recklessly." "[U]nder A.R.S. § 13-202(C) a person who recklessly causes the death of another also acts with criminal negligence." *State v. Parker,* 128 Ariz. 107, 109, 624 P.2d 304, 306 (App. 1980), *vacated in part on other grounds by State v. Parker,* 128 Ariz. 97, 624 P.2d 294(1981). The mental states are interrelated, in effect; the lower mental states may be viewed as building blocks to the greater.

In *Parker,* the defendant moved for a directed verdict on a manslaughter charge. The State responded by moving to amend the indictment to allege negligent homicide. The defendant consented to the amendment on the condition that he could challenge both rulings on appeal. The Court then denied the defendant's motion and granted the State's. On appeal, the defendant claimed the Court erred in granting the State's motion because negligent homicide was not a lesser-included offense of manslaughter. The Court of Appeals disagreed. Moreover, the Court noted that the defendant's "consent to the amendment was as unnecessary as the amendment itself," because specification of the manslaughter offense constituted a charge of "all offenses necessarily included therein." *Parker,* 128 Ariz. at 109.

This Court's ruling undermines the State's right to present evidence to an essential element of both negligent homicide and manslaughter, the requisite mental state. Pursuant to

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Rule 13.2(c), Ariz. R. Crim. P., Defendant is on trial for both offenses and the State should not be precluded from presenting relevant evidence relating to either offense subject to the Rules of Evidence.

In *State v. Wall,* 212 Ariz. 1, 126 P.3d 148 (2006), the Arizona Supreme Court set forth the rationale behind Rule 23.3, Ariz. R. Crim. P., which requires the trial judge to provide the jury with verdict forms "for all offenses necessarily included in the offense charged" as follows:

> The rule requiring instruction on lesser-included offenses is designed to prevent a jury from convicting a defendant of a crime, even if all of its elements have not been proved, simply because the jury believes the defendant committed some crime. As the Supreme Court explained: "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." *Beck v. Alabama,* 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (quoting *Keeble v. United States,* 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973)). Giving a lesser-included offense instruction mitigates that risk. *Id.* at 637, 100 S.Ct. 2382.

Id. at 4, 126 P.3d at 151.

It is difficult to imagine how evidence relevant to a lesser-included offense is prejudicial to the greater offense. The Court's ruling begs the question – if not now, when? In other words, if the State is not allowed to present relevant evidence pertaining to the lesser-included, the State is forever precluded from doing so. To preclude the evidence is to completely gut the law that provides that the lesser offense is necessarily included and need not be charged.

RESPECTFULLY submitted this 23rd day of March, 2011.

By _____ for
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